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Supreme Court, U.S.
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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALTER REED MARTINDALE, III

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the admission of third party statements contained within the Defendant's alleged confession were prejudicial and constituted hearsay in violation of Rules 801 and 802, Federal Rules of Evidence.

2. Whether statements made by the Defendant to customs agents upon his re-entry into the United States were in violation of his constitutional rights as outlined in *Miranda v. Arizona*, 384 U.S. 436, 86 S.C. 1602, 16 L.Ed. 2d 694 (1966), and whether these statements were taken during the course of an unlawful detention under *Florida v. Royer*, 460 U.S. 491, 75 L.Ed. 2d 229, 103 S.C. 1319 (1983).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Walter Reed Martindale, petitions this Court for a writ of certiorari to review the Judgment and Decision of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction against Petitioner.

OPINIONS BELOW

The Opinion of the District court denying the Petitioner's pretrial motions (Appendix A). The Jury Verdict (Appendix B). The Opinion of the Fourth Circuit Court of Appeals (Appendix C), USA v. Walter Reed Martindale, III, 790 F.2d 1129 (4th Cir. 1986).

JURISDICTION

The Judgment of the Court of Appeals was entered on the 21st day of May, 1986. The Petitioner's Petition for Rehearing was denied on July 3, 1986 (Appendix D). Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution. Also, Federal Rules of Evidence, Rules 801, and 802. (Appendix E)

STATEMENT OF THE CASE

Under the Government's theory of the case, Defendant Walter Martindale and one Ibrahim Al-Rawaf had conspired and agreed, sometime in April 1983 through October 1983, to assassinate one Mohammed Al-Fasi. Al-Fasi's family lived in London, England. The Government further alleged that Martindale had pursuaded a friend to buy, an Uzi, 9mm, semi-automatic rifle, which was to be used to carry out the assassination. The Government suggested that Mr. Martindale had caused that weapon to be shipped in interstate transportation to Virginia from the State of Florida and that the Defendant subsequently took the weapon with him on a flight to London, England.

On the morning of Tuesday, October 25, 1983, Scotland Yard investigators approached the Defendant at Gatwick Airport, Sussex, England, and advised him he was under arrest for a firearms offense in the United Kingdom (Joint Appendix of Petitioner and Respondent before the 4th Circuit Court of Appeals Volume I, page 153; hereinafter: "Appendix Below"). Afterward, the Defendant was "cautioned" under British law with the words "You understand that you have been arrested for firearms offenses and have

been told that you need not say anything unless you wish to do so. . ." The Defendant was conveyed to Gatwick Police Station and later the same day transported to Rochester Row Police Station in London. Beginning at 3:30 p.m. on October 25, 1983, the Defendant was interviewed by Detective Drain and Burke, at the Rochester Row Police Station. Again, on October 26, 1873, while still incarcerated at the Rochester Row Police Station, the Defendant was brought from his cell and interviewed from 11:00 a.m. until 8:09 p.m. According to the transcribed statements taken from the Defendant on October 25 and 26, he was not formally charged by any law enforcement official until 8:00 p.m. on October 26. This would have been approximately 34 hours following his initial arrest. (Appendix Below, Volume I, p. 240).

Following his arrest in England, the Defendant was kept incommunicado for one month and upon advice of counsel, pled guilty to a firearms possession charge there in the United Kingdom. Thereafter he was released from jail, allowed to board a plane for the United States. Prior to his release, his passports were taken, and he was allowed to travel only after documentation was received from the United States Embassy.

After an eight hour, sleepless flight, Mr. Martindale arrived in the United States where he was questioned and given a "100%" search by two U.S. customs agents. These agents conducted an interview with him in a private room apart from all other passengers for approximately one and a half to two hours (Appendix Below, Volume I, p. 303). The agents admitted that they had been alerted to Martindale's arrival in the United States and they pulled him out of the passenger line specifically for search and questioning (Appendix Below, Volume I, p. 278). Martindale testified to what happened upon his arrival in the United States at his suppression hearing before the Honorable Albert V. Bryan on September 14, 1984. According to Martindale, upon leaving the aircraft, he was not allowed

to carry the travel documents he had received from the United States Embassy. This packet was carried by a British Airways official, and Martindale was led to Immigration (Appendix Below, Volume I, p. 300). Department of Immigration agents asked Martindale why he did not have his passport and he explained that he had been given a letter by the United States Embassy permitting him to return to the United States. The person to whom he spoke, left, came back and advised him:

> "All right, you are admitted. Whether or not we are going to charge you for your passport, we don't know." (Appendix Below, Volume I, p. 300).

About 15 minutes after he had been taken to Immigration, he was approached by customs agents in uniform who questioned him and began opening his baggage. According to Martindale, he was asked if he had any weapons. At that point, a man nodded toward him and said "that's him" and he was taken out of the mainstream of incoming passengers. Martindale was then advised that there were two people who wished to speak with him. These two agents proceeded to take him to a private room (Appendix Below, Volume I p. 301, 302). Upon entry into the room the door was closed. Martindale was told to "empty my pockets and they went through my briefcase, and other bags had just been checked, but they looked . . . one of them was looking through that. One went through my wallet, took everything out of the wallet, or asked me to take everything out of the wallet and put it on the table. They were instructed to ask me some questions." (Appendix Below, Volume I p. 302, 303). According to Martindale, the questioning that followed lasted from an hour and a half to two hours (Appendix Below, Volume I p. 303). When asked by his trial counsel whether he was at liberty to leave, he answered "no, I was not" (Appendix Below, Volume I, p. 303). When asked by his trial counsel about his feelings at the time he was being questioned, Martindale responded:

> "Well, I assume that I have to answer these questions. There was no doubt about it. I wasn't going to leave there until I did. I have been on the flight for the hours, and I had been up the day before, and I didn't sleep on the plane, nor did I sleep the night before."(Appendix Below, Volume I p. 304).

After reiterating that he had just been released from one month's custody, Martindale confirmed that at no time was he ever advised of his rights (Appendix Below, Volume I, p. 304). At the conclusion of the suppression hearing, The Court ruled that the statements were voluntary and admissible even though no *Miranda* warnings had been given.

At trial, the United States introduced into evidence the statements taken by British investigators on October 25 and October 26, 1983. These statements were objected to as containing highly prejudicial comments of the investigators as to Martindale's truthfulness and also because the statements contained charges of other crimes as well as statements of a third party, a Mr. Phuc, who had already testified in the course of the trial. In addition, the prosecution introduced the statement of the Defendant made to the customs agent upon his entry into the United States. The admission of all these statements were strenuously objected to by defense counsel.

The Defendant was found guilty of seven out of nine counts of the indictment, regarding the charges of con spiracy, passport violations and interstate shipment of weapons.

REASONS FOR GRANTING THE WRIT

ARGUMENT

I. WHETHER ADMISSION OF THIRD PARTY STATEMENTS CONTAINED WITHIN THE DEFENDANT'S ALLEGED CONFESSION WERE PREJUDICIAL AND CONSTITUTED HEARSAY IN VIOLATION OF RULES 801 AND 802, FEDERAL RULES OF EVIDENCE.

The petitioner maintains that third party statements contained in his interview by British investigators should not have been admitted either as confessions or admissions under the Federal Rules of Evidence 801 and 802. During the course of his interrogation, in England, the defendant was confronted with statements that he purportedly made to a Vietnamese named Phuc and also accusations made by British investigators, both of which he emphatically denied. Trial counsel objected to these statements, when offered by the prosecution, as being self-serving, containing hearsay and being inaccurate, prejudicial information. As observed by the trial court when the statements were offered in evidence, the government's tactic in introducing them amounted to "over-kill". (Appendix Below, Volume II, page 841).

During oral argument before the 4th Circuit, three judge panel, petitioner's counsel cited several examples from the trial record where the investigators had quoted Phuc as saying that Martindale had asked Phuc to be part of a kidnap plot. In addition, the investigators suggested that Martindale was involved in a plot to kidnap Al-Fassi and accused him of lying when he denied the accusations.

A brief review of these highly prejudicial remarks is appropriate for the purpose of this petition. Referring to the statements of the defendant taken by Detective Inspector Field on October 26, 1983 (Appendix Below, Vol-

ume I, page 194) beginning with this question put to Martindale by Inspector Field:

> "Q. In the state department you were a cog in the machinery. Supposidly (sic) for A.I.T.C. you are the President and you have been since Feb or March this year. For this position a salary has been agreed of 45,000 dollars per annum, and yet you cannot give us the turnover for your company. *Because you cannot give me a figure I say either your (sic) not a successful businessman or as is more likely your (sic) not a genuine businessman at all.* [emphasis added]
>
> A. The records will show you're wrong, public records will show you're wrong, other records, including company record will show you're wrong, which will depict the scope and type of project that we are involved with and as our start up phase in any company which has changed hands in primary ownership, will show a period of profit and loss and establishment.

The remark of Inspector Field left little doubt that he believed Martindale was lying although his comment at this point was couched in more subtle language than seen later in the statement.

In the same statement the investigator makes the following comment:

> "Q. What you have been doing has not been in connection with any genuine business concern. *You have done the ground work and detailed plan and instructions in a plan to kidnap AL-FASSI.* [emphasis added]
>
> A. That is an imphatic (sic) No." Appendix Below, Volume I, p. 207).

Later the following question is put again by the investigator to Mr. Martindale:

"Q. The point I was trying to make was that yesterday in reply to DI BURKE'S questions you said you were backer for this project when in fact you have no collateral for such a project. Your reply at that time was a *lie* and *your only intention as regards the AL-FASSI family has been one of kidnap.* [emphasis added]

A. As to the way the question reads now and the way I understood it with my previous clarification I answered truthfully. In regards to the question of kidnap I never conspired, planned or discussed any such proposal." (Appendix Below, Volume I, p. 211).

The following questions are also asked by the investigator:

"Q. Also during that conversation PHOC says that *you said you would return in 2 weeks with quote "A gang of cubans to do the job."* What do you have to say to that. [emphasis added]

A. I did say that I would return in 2 weeks if the proposal was approved for the surveillance and the information Mr. PHOC would give me on the cost but made no reference to gang of Cubans."

"Q. Returning now to the meeting on Saturday which started at the Holiday Inn, PHOC agrees with you that you entered the pub. He agrees that you had a bacardi- and coke and that he had a pint of beer. PHOC then says' that you began the conversation in the pub by telling PHOC that if you, and when I say you I mean you personally and PHOC and any others that were to be envolved, (sic) that if you were successful in *kidnapping* the man that PHOC was supposed to follow then PHOC would get 6000

pounds. What is your comment regarding that. (emphasis added)

A. I said if the project was successful, meaning that if the information developed proved useful or valuable he could, not would, but could make a bonus of 6000 US dollars not pounds. I never used the word kidnap."

Q. *There is no mistake here PHOC is quite catagoric that you referred to the kidnap of this man,* that he was supposed (sic) to follow. I will remind you that everything else as regards that meeting, as given by PHOC agrees with your version. Do you still say you never used the word kidnap. [emphasis added]

A. No, not to my recollection I don't.

Q. I am not interested in recollection but intention. If you intented (sic) to kidnap AL-FASSI you may have used that term without really thinking. What was your intention.

A. I can assure you that in all honesty I had no intention of kidnapping anyone including Mr. AL-FASSI nor have I talked to other people or conspired with other people in this regard. You should ask Mr. PHOC whether I said this in English or in Vietnamese." (Appendix Below, Volume I, p. 221, 222).

At the conclusion of the interview, Inspector Field made the following statement which was placed in the interview as a question:

"Q. It would seem to me that from 1979 until Feb. 1981 you used your diplomatic passport frequently in the service of your country. *When you were fired by the state department you then used a normal passport again frequently but this time*

> *on your own behalf, when the plan to kidnap AL-FASSI come (sic) into being you began again to use the cover of your past Diplomatic employment. In particular it seems to me that on the 16th Oct 1983 when you entered GATWICK AIRPORT you did so knowlingly importing weapons illegally for use in connection with the iminent kidnap attempt. You believed and you were correct that your Diplomatic Passport would prevent the weapons being discovered.* You have any comment. [emphasis added]
>
> A. Yes, firstly I was not fired from the State Department I resigned. Secondly, I did not come to England to misrepresent myself or to import weapons. The use of the Diplomatic Passport was not pre-meditated. (Appendix Below, Volume I, p. 237).

At oral argument, The Court of Appeals was critical of the use of these statements at trial. Following the denial of the petition for re-hearing, counsel for petitioner ordered transcription of the tape recording of the oral argument. Unfortunately, there was a tape malfunction which precluded transcription of a number of questions and comments by the Justices to the United States Attorney. From the comments which were preserved, however, there is clear indication of the court's dissatisfaction to the use of these third party statements and comments which were contained within the Martindale interviews introduced by the government at trial. As found at the bottom of page 20 of the transcript of oral argument, Appendix F, *infra*, the court said the following:

> "Tell me, before you get into that, right quickly, why it was thought necessary to go through all that rigamarole in the trial. *I know you don't want to leave any stone unturned, and you have tried to get a conviction and do your duty, but*

> *what in the world was the purpose of going through all that rigamarole with the statements in England and then doubling back and putting in the whole statements*?" [emphasis added]

The Justice, at this point, was clearly referring to the fact that the government had called as witnesses, the British investigators and Phuc before introducing the statements in question. At the bottom of page 21, Appendix F, the Court made further comment with reference to the prejudicial statements contained within the Martindale interview:

> "The Court: Mr. Howard quoted from the record. There was some statements which were introduced which (inaudible) the Scotland Yard people carried, *kidnapped,* or seized, or caught whatever word you want to use, seized the witness (inaudible) and all the answer was, no. Now, could you have put that witness on the stand and said, we told you to do this and we told you to do that, and we told you to do the other thing. He couldn't have done that. You certainly couldn't have done it by hearsay. And he said no. *It seems to me it is questionable to the extreme to introduce those. Now, if he had gone ahead and said, well, yes, I did try, he might have had a different question, because it is a little different from an exculpatory statement, but when he says a simple no, he's gotten into evidence the fact that one respected law enforcement agency thought they had the goods on him. And I don't know why in the world you wanted to put that in.*" [Emphasis Added]

Referring to the charges contained within the Martindale statement made by the British investigators with respect to the kidnapping of Al-Fassi, the Court said this at the middle of page 22, Appendix F:

"THE COURT: (inaudible *that wasn't really what you charged him with anyway.* You had all the evidence that is just absolute that he had acquired this illegal firearm, and you had dead wood on him, he carried it with him over to England. You have every article of evidence you needed. [emphasis added]

MR. WILLIAMS (government counsel): Well, let me—there were really actually several—several pile ups. First of all, about why the statements. First of all, there were only approximately two places, and I think counsel pointed them out, and you, Judge Murnagham, mentioned them, where—by Inspector Fields, and this is the second interrogation, where he made an accusation, and this accusation was denied, but in all the remaining places in both Inspector Fields' interrogation, when he said to him, did you say such and such a thing to Phuc, Martindale, in those instances, said this is what I said, I didn't say exactly that. Now, let me—

THE COURT: But what does that have to do with the firearm violation?

MR. WILLIAMS: Because what Martindale's story was was that he didn't normally bring that firearm into—(tape malfunction.)"

Counsel for the petitioner can represent to this Court that the 4th Circuit panel then verbally criticized the United States for the over-kill approach in the case, although this is not reflected in the incomplete oral argument transcript.

Notwithstanding the remarks of the Court and the above quoted exchanges with the government attorney during argument, there was absolutely no reference to these issues in the 4th Circuit's opinion of May 21, 1986. The

defendant was never charged with the crime of *kidnap* while in England and was never charged with that crime in the indictment on which he stood trial in the Eastern District of Virginia.

It is a well-established principle that proof which shows or tends to show commission of other crimes and offenses at other times, even though the same nature as the ones charged, is incompetent and inadmissible for the purpose of showing the commission of the particular crimes charged *Faust v. United States,* 163 U.S. 452, 441, L.Ed. 224, 16 S.Ct. 1112. (1986)

It is well recognized that if a statement is made by another person in the presence of a party to an action, containing assertions of fact, which if untrue, the party would under all the circumstances naturally be expected to deny, his failure to speak has traditionally been receivable against him as an admission (4 Wigmore, Evidence, §1071, Shadborn RAV. 1972).

As found in McCormick on Evidence, 3rd Edition, Handbook Series, Section 270, Admissions by Conduct: (b) (silence) page 800:

> "... Since it is the failure to deny that is significant, an equivocal or evasive response may similarly be used against him on either theory, *but if his total response adds up to a clear-cut denial, this theory of implied admission is not properly available.* [emphasis added]"

Cited in support of the above statement are the cases of *United States v. Lilley,* 581 F.2d 182 (8th Cir., 1978) (after hearing, without comment, her husband's statement implicating her, defendant made a contradictory statement; held, no adoption); *Commonwealth v. Locke,* 335 Mass. 106, 138 N.E.2d 359 (Mass. 1956); *Commonwealth of Pennsylvania ex rel. Smith v. Rundle,* 423 Pa. 93, 223 A.2d 88 (Penn 1966).

With reference to extra judicial admissions, the following is found in Wigmore on Evidence, 3rd Edition, Volume IV, §1072, p. 88:

> "(5). It ought not to be necessary to note that the party's *denial* of the third person's statement destroys entirely the ground for using it. (Citing cases from California, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, New Jersey, Pennsylvania, New York, South Dakota, Tennessee and Virginia)." [emphasis supplied]

In the case of *Skiskowski v. United States* found at 158 F.2d 177 (D.C. Cir. 1946) appellants were convicted of robbery. An FBI Agent was allowed to testify as to his interrogation of one defendant named Quinn. The agent testified he confronted Quinn with a statement made by a co-defendant, Boley, out of Quinn's presence. The trial court permitted this testimony on the theory that though Boley's statement was not admissible as such against Quinn, it was admissible for the purpose of showing Quinn's responses or reactions when confronted with the accusations contained therein. According to the agent, the defendant nodded affirmatively as he read through the statement and the agent interpreted this affirmative nod as Quinn's agreement with the statement. The agent did testify, however, that when he finished telling Quinn what Boley had said, Quinn denied participating in the robbery. The D.C. Court of Appeals held that it was error for the trial court to have allowed this tactic by the government and said the following at the bottom of page 181:

> "It is our opinion that where, as here, the final response attributed to the defendant, when confronted with the third party statement of accusation, was unmistakably negative, the whole of the testimony is objectionable. None of the collected cases cited above go so far as to admit this type of testimony in a fact situation such as

> we have here. It is one thing for the prosecution to show "silent acquiescence" to a third party statement, but it does not follow that, where the ultimate response is positively negative, a preliminary nodding of the head, while the statement was being read, is enough foundation to admit the testimony under this doctrine. . . . Where the accusatory statement in unequivocally denied by the accused, it is not admissible against him. People v. Heissler, 338 Ill. 596, 170 N.E. 685; Com. v. Sydlosky, 305 Pa. 406, 115 A. 154."

In the case of *United States v. Ragano,* (5th Cir.) decided in 1973, and found at 476 F.2d 410, a revenue agent was allowed to testify to an alleged admission made by the appellant, one Rizzo. Rizzo testified to this purported statement in his testimony before the Florida State Beverage Commission. The agent testified that he had told the defendant that he was aware of Rizzo's testimony and that he asked appellant whether Rizzo's statements were true. According to the agent appellant replied no. Defendant did acknowledge that he also was aware of Rizzo's testimony. In the latter part of his testimony the agent acknowledged that the defendant made the comment that he did not know why Rizzo had testified that way because "it was not true." The Court in reversing Ragano said the following at the middle of page 415 of its opinion:

> "Appellant neither tacitly nor expressly admitted the alleged statement by Rizzo. On the contrary he flatly denied the truth of any such statement. Certainly in the face of his denial, appellant's knowledge of Rizzo's testimony can hardly be construed as an admission. Where the witness's total response adds up to a clear-cut denial, even any theory of implied admission is not available. McCormick, Handbook of the Law of Evidence, at 528 (1954 Ed.); Com. v. Twombly, 319 Mass. 464, 66 N.E.2d 362, People v. Wysocki, 267 Mich.

52, 255 N.W. 160. "A flat denial [is] in no sense an admission." *Twombly, supra.*

In the case of *United States v. Lilley* (8th Cir 1978) found at 581 F.2d 182, defendant was indicted for forging and uttering and other crimes. An agent Buchholz, testified that he interviewed the appellant concerning a check and she denied any knowledge but stated that her ex-husband might be involved. He then spoke with the husband who implicated the appellant. In a second interview he related to the appellant the information that Mr. Lilley had given. In response, appellant furnished a written statement denying the incriminating accusations against her made by the husband. The government argued that agent Buchholz's testimony was properly admitted under Federal Rules of Evidence 801 (d) (2) (b) which provides:

> "(d) Statements which are not hearsay. A statement is not hearsay if [it is an] (2) Admission by party-opponent. The statement is offered against a party and is (B) a statement of which he has manifested his adoption or belief in its truth.

The Court pointed out in *Lilley,* however, that the record clearly indicated that despite appellant's failure to deny expressly each and every portion of her husband's statements, her written statement contradicted her husband in almost every material aspect. The Court in reversing the judgment against the defendant wrote the following at the bottom of its opinion at page 188:

> "Since we cannot say that the introduction of Agent Buchholz's testimony was harmless beyond a reasonable doubt, and since the testimony implicated appellant on both counts of the indictment, the case must be reversed and remanded on both counts or a new trial."

In reference to the British agents repeated suggestion that Martindale was involved in a "kidnap plot" and that

he was lying to the agents, counsel would cite the case of *Arpan v. United States* from the Eighth Circuit Court of Appeals, decided in 1958, and found at 260 F.2d 649. Defendant was charged with the homicide death of his wife, Jeanette, and was convicted of second degree murder. The government, over objection, was permitted to show a statement purportedly made by the defendant's mother that, "I think Clayton [appellant] has shot Jeanette [wife]." The Court of Appeals held this statement to be both irrelevant and incompetent. The court reversed and the government filed a petition for rehearing. In denying this petition the Court said the following on page 659:

> "Opinions or expressions of witnesses as to an accused's guilt are of course irrelevant and incompetent as considerations for conviction, and in this sense the question whether they were or were not in fact made necessarily is collateral to the issues of the trial. . ."

Petitioner's present counsel attempted to draw a parallel between Judge Bryan's comment and characterization of "overkill" in the present case and the case of *United States v. Alec Brown*, 767 F.2d 1078, decided by the 4th Circuit Court of Appeals of February 8, 1985. There an FBI agent was allowed to give testimony concerning conversations between a co-defendant and the defendant Brown as related to the agent by the co-defendant. In that purported conversation the defendant allegedly asked the co-defendant to steal shrimp. In addition, the agent testified to a third party statement in which a third party said he bought the shrimp from Brown. Finally, the agent testified that he was told by the police about a conversation between Brown and a co-defendant. The government in *Brown* said the statements were admitted as "background" and not offered for the "truth". The Court in *Brown* gave the following limiting instruction:

> "this is not admitted for the truthfulness of the statement. But it is admitted only [as] a background as to what occurred subsequent to that time, if it is established what did occur."

Referring to the Federal rules of Evidence 801(c), which defines hearsay and its admissibility in a federal trial, the Court said the following in its opinion on page 1084.:

> "Indeed, the relation by Thonneson of what the base police told him that Norris had told them was double hearsay, even more objectionable, of course, because more unreliable than hearsay only once removed. United States v. Melia, 691 F.2d 672 (4th Cir., 1982)." As in the case of *United States v. Carvalho,* 742 F.2d 146 (4th Cir. 1984), the strategy of *overkill* pursued by the government, with little regard to countervailing concerns of undue prejudice, has resulted in a trial which we think was not essentially fair. In the circumstances of this case, with the government setting up the background that Brown stole the shrimp and only thereafter calling witnesses whose testimony tended to show that Brown in fact stole the shrimp, we are of the opinion that the *limiting instructions of the trial court were insufficient to dispel the resulting prejudice from the introduction of needless hearsay evidence on four separate occasions to prove Brown stole the shrimp.*" [emphasis added]

The Judgment of the district court in *Brown* was vacated and the case was remanded for a new trial.

Although the 4th Circuit Court's opinion on page 10 refers to the trail judge's caution (which is identical to that set out in Brown), the Court did not distinguish nor mention the *Brown* case in its discussion. The record will clearly reflect that petitioner's counsel relied heavily on *Brown* in the oral argument before the panel. As in *Brown,*

the third party incriminating statements and prejudicial remarks of the British investigators were contained on *six separate exchanges* between the agent and defendant in the statement of October 26, 1983. The introduction of this needless hearsay and resulting prejudice to the defendant could hardly be cured by the Court's limiting instruction.

Under the Federal Rules of Criminal Procedure 801(d)(2) a statement is not hearsay if:

"(2)Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth." (Appendix E)

There is nothing to suggest that the transcribed answers of Martindale cited above were adopted by him or that he acknowledged the same to be true.

Under rule 802 such statements were not admissible under the Federal Rules of Criminal Procedure or any other rules, described by the Supreme Court pursuant to statutory authority or by Act of Congress. No such assertion has ever been made by the government at trial or on appeal before the 4th Circuit.

For the foregoing reasons it is respectfully submitted that the statements in issue were highly prejudicial hearsay and thus the defendant should be granted a new trial.

ARGUMENT II

WHETHER STATEMENTS MADE BY THE DEFENDANT TO CUSTOMS AGENTS UPON HIS RE-ENTRY INTO THE UNITED STATES WERE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS AS OUTLINED IN MIRANDA V. ARIZONA 384 U.S. 436, 86 S.C. 1602, 16 L.ED. 2D 694 (1966), AND WHETHER THESE STATEMENTS WERE TAKEN DURING THE COURSE OF AN UNLAWFUL DETENTION UNDER FLORIDA V. ROYER, 460 U.S. 491, 75 L.ED. 2D 229, 103 SUPREME COURT 1319 (1983).

Upon the defendant's release from British custody, his passports were taken away and he had to request the United States Embassy for a travel document in order to return to the United States. (Appendix Below, Volume I, p. 299). He then boarded a flight from London to New York, which took approximately eight hours. Upon his arrival in the United States, he was questioned at Immigration as to why he did not have a passport, and upon showing a letter from the United States Embassy, he was admitted into the country with the admonition from Immigration, "All right. You are admitted. Whether or not we are going to charge you for your passport, we don't know." (Appendix Below, Volume I, p. 300). According to the defendant, the initial inspection of his luggage through customs took approximately fifteen minutes (Appendix Below, Volume I, p. 302) at which time he was approached by two customs officials. Both Martindale and his baggage were removed to a private office in the airport. In the private room the defendant was required to empty all his pockets. An inspection was made of his briefcase and other bags, as well as his wallet, and he was instructed to answer questions. (Appendix Below, Volume I, p. 303). The procedure outlined by the defendant was described by an Agent Fanning as a 100% search and "not a routine examination". (Appendix Below, Volume I, p. 270). According to Fanning, it is done if there is some suspicion or if

the person is found with more stuff than he declared that he has to pay duty on. Fanning also said that he was instructed to give Martindale the 100% search by an agent in Washington who called him directly before Martindale's arrival in the United States. (Appendix Below, Volume I, p. 281). The Court asked him why he had conducted a 100% search and agent Fanning responded:

> "THE WITNESS: Because he was supposed to have had weapons, caught with weapons in England, so I just wanted to make sure, just to cover myself that he wasn't bringing any back or didn't have any extra things back." *Id*

In conclusion, Agent Fanning testified that he specifically wanted to question Martindale about the weapons incident in England. (Appendix Below, Volume I, p. 269). Following the 100% search, according to Fanning, Martindale was interrogated for approximately forty-five minutes. (Appendix Below, Volume I, p. 273). The defendant at no time was advised of any rights or warnings.

According to the defendant, he had been up all day before his flight to the United States, and did not sleep on the plane, nor did he sleep the night before. (Appendix Below, Volume I, p. 304). Martindale testified that he felt that he had to answer the agents' questions and wasn't going to leave there until he did. (Appendix Below, Volume I, p. 304). It must be remembered that Martindale had been in continuous custody for one month prior to his flight to the United States and yet was never advised of his Miranda warnings while in England or before the 100% search and interrogation.

It has long been established that Miranda warnings are not necessary in routine customs search situations. As noted in the case of *Carroll v. U.S.*, 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed 543, 551 (1925):

> "Travellers may be stopped in crossing an international boundary, because of natural self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects, which may be lawfully brought in."

Detention and questioning as ordinarily occur in the context of routine customs inspections are accepted as a standard burden on international travel. A different situation emerges, however, where an individual has been taken out of a routine baggage check situation, and where the finger of suspicion is directed towards the defendant.

In the case of *U.S. v. DeLaCruz,* 420 F.2d 1093 (7th Cir 1970), the defendants arrived at O'Hare Airport where a routine check of their baggage revealed no contraband. A customs officer recognized them, asked for their passports and directed them to a separate room. There the defendants' luggage was re-examined, but no drugs were found. The defendants were then separated again, and Mr. De La Cruz was taken into a separate room. The agent put his hand under De La Cruz's coat, and upon feeling a large bulge, asked him what he had. The defendant's response was, "Chemicals." The agent then asked if these were drugs, and the defendant acknowledged affirmatively that they were drugs in Spanish.

The De La Cruz court found under the circumstances that the defendant De La Cruz was not being detained and questioned during the context of a routine customs inspection since the finger of suspicion had clearly been pointed to the defendants after they were identified at the airport. The defendant had been questioned without the appraisal of his Miranda warnings. In holding that the statement of the defendant acknowledging his possession of drugs was inadmissible, the court pointed specifically to the fact that the defendants had been taken into an interrogation room where they were subjected to a close

examination by four agents and that the defendant De La Cruz had been separated from the others, frisked, and specially questioned. Under these circumstances, the court found that the defendants were restrained in a custodial interrogation, that the suspicion of guilt had focused upon him and thus the atmosphere of interrogation was coercive within the concept of Miranda. See Also *U.S.* v. *Salinas* 439 F.2d 376 (5th Cir. 1971); Where the defendant's statement made in a private room was inadmissable because his freedom of movement had been sufficiently restricted so as to place him "in custody."; and *U.S.* v. *Garcia* 496 F.2d 670 (5th Cir. 1974).

In the recent case of *U.S. v. McCain,* 556 F.2d 253 (5th Cir. 1977), the defendant arrived at Miami International Airport, and while proceeding through customs presented herself along with luggage to the customs inspector, Rollins. Rollins noticed that she appeared very nervous, that she was wearing tight-fitting clothes which revealed a bulge in the abdominal area. Following the initial search and because of the bulge noticed in her clothing, agent Rollins believed at that a secondary search was warranted. He discussed this with his supervisor who concurred in the decision. The defendant was then taken to a secondary search room where two female customs inspectors conducted a strip search. This search produced no incriminating evidence. When the customs agents were advised of the non-incriminating search, one of the agents entered the search room and produced a booklet of newspaper clippings referring to tragedies that had occurred when people attempted to hide narcotics in their body cavities. A second search of the defendant's luggage was conducted, and upon being questioned a second time by the agent who had presented the newspaper clippings, the defendant blurted out, "Yes, I do have narcotics in my body." After removing the narcotics from her body, defendant was placed under arrest, and was, for the first time, advised of her rights.

The court held that the strip search of the defendant was obviously an "in custody" situation for Miranda purposes. It was following this unproductive strip search that she was taken a second time to the customs supervisor's room and questioned while her luggage was being re-examined. The court, in holding that the defendant should have been advised of her rights before any such questioning, said the following on p. 255 of its opinion:

> "... while we recognized that Inspector Korzeniowski's motives were beyond reproach, it is nevertheless true that it was during this seven or eight minute period that Ms. McCain admitted she was carrying cocaine. The government offered no testimony to the effect that Ms. McCain was free to leave after the initial strip search. In fact, all the evidence is to the contrary. However, if we were to assume that Ms. McCain was not being physically restrained from leaving after the strip search, she was obviously able to leave only if she was willing to abandon her luggage, and this itself is a sufficient restriction on one's freedom of action so as to trigger the giving of Miranda warnings before proceeding with any interrogation."

Citing the *Salinas* and *Garcia* cases, the Fifth Circuit reversed and remanded the defendant's case for dismissal.

In *U.S. v. Delsoccoro Castro,* found at 573 F.2d 213 (5th Cir. 1978), a similar conclusion was reached in a case involving a defendant convicted of conspiracy to import cocaine, importing cocaine and possessing cocaine with the intent to distribute. In that case two customs officials observed an airline hostess wearing oversized, ill-fitting shoes, similar to shoes that they had knowledge had been previously used to carry contraband. At the customs agent's request, the hostess was escorted by the officers to a search room where her shoes were inspected and found

to contain cocaine. The airline hostess informed the officials that she was supposed to deliver the shoes to another party. The other officers accompanied the hostess to an airline paging counter. The stewardess gave the defendant's name and asked that she be paged. Shortly thereafter, the defendant appeared and went directly to the airline hostess and embraced her.

At that point one of the customs officers displayed his badge and requested that the woman accompany the officers to a search room. She was asked if she had money for the airline hostess and whether she was supposed to received something from the stewardess. She answered both questions affirmatively. The defendant was then advised of her constitutional rights. The court said the following at the bottom of p. 215:

> "Whether or not the fact that the defendant responded to the page and embraced Mouthon alone would have constituted probable cause for arrest, the agent's observations of the defendant clearly focused the investigation. Her subjective belief, to which she testified, that she was not free to leave the officers, is buttressed by their request, whether an invitation or a demand, that she accompany them to a confined area some distance from their initial encounter. The officers intent to eventually arrest her is readily inferable from the circumstances. As in Alberti, the officers should have informed the defendant of her rights prior to interrogation." See Also *Alberti* v. *Etelle*, 524 F.2d 1265 (5th Cir., 1975)

The case of *Florida v. Mark Royer*, 460 US. 491, 75 L.Ed. 2nd 229, 103 S. Ct. 1319 (1983) presents a remarkable parallel to the factual situation in the present case. In *Royer*, a suspect who fit the so-called "drug courier profile" was approached by two detectives at Miami International airport. Upon request, but without oral con-

sent, Royer produced his airline ticket and driver's license. The ticket and baggage identification tags bore the name "Holt", while the driver's license had the name "Royer". Royer explained that his reservation had been made by a friend in the name of Holt. The agents informed Royer that they were narcotics investigators and suspected that he may be transporting narcotics.

The agents held Royer's airline ticket and identification and asked him to accompany them to a room adjacent to the concourse. Royer said nothing in response but went with the officers as he had been asked. Without Royer's consent, Detective Johnson retrieved his luggage and brought it to the room. Royer was asked if he would consent to a search of his suitcases once Johnson joined him and the other detective inside the room. The defendant produced a key without responding. Inside the detective found marijuana. The defendant then said he didn't know the combination to the second suitcase but said "no, go ahead" when the detective asked if he had any objection to a search of that case. The defendant also added that he did not object that the second suitcase had to be pried open. Inside was found more marijuana.

Prior to his trial, Royer filed a motion to suppress but the trial court found that Royer's consent to search was "freely and voluntarily given." On appeal, the District Court of Appeals held that Royer had been involuntarily confined within a small room without probable cause. The court further held that Royer's restraint exceeded the involuntary restraint permitted by *Terry v. Ohio,* 392 U.S., p.1, 20 L.Ed. 2d 889, 88 S.C. 1868 (1968) at the time his consent to search was obtained.

This court in affirming the District Court of appeals said the following in its opinion on page 235:

> "Several factors led the court to conclude that respondent's confinement was tantamount to arrest. Royer had 'found himself in a small enclosed

> area being confronted by two police officers—a situation which presents an almost classic definition of imprisonment.' 389 So 2d 1007, 1018 (Fla App 1980). The detectives statement to Royer that he was suspected of transporting transporting narcotics also bolstered the finding that Royer was 'in custody' at the time the consent to search was given. Ibid. In addition, the detective's possession of Royer's airline ticket and their retrieval and possession of his luggage made it clear, in the District Court of Appeal's view, that Royer was not free to leave. Ibid."

At his suppression hearing Royer testified that he did not feel he was free to leave.

This Court held on page 236 of its opinion that it was beyond dispute that,

> "... validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. Lo-Ji Sales, Inc. v New York, 442 US 319, 329, 60 L Ed 2d 920. 99 S Ct 2319 (1979); Schnecklot v Bustamonte, 412 US 218, 233-234, 36 L Ed 2d 854, 93 S Ct 2041 (1973); Bumper v North Carolina, 391 US 543, 548-549, 20 L Ed 2d 797, 88 S Ct 1788, 46 Ohio Ops 2d 382 (1968); Johnson v United States, 333 US 10, 13, 92 L Ed 436, 68 S Ct 367 (1948); Amos v United States, 255 US 313, 317, 65 L Ed 654, 41 S Ct 266 (1921)."

This Court made it clear that Terry and its progeny nevertheless created only limited exception to the general rule that seizures of persons require probable cause to arrest. On page 237 of its opinion, the following was said,

> "*Detentions may be 'investigative' yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest.* Dunaway v New York, supra, made this clear. There the suspect was taken to the police station from his home and, without being formally arrested, interrogated for an hour. The resulting incriminating statements were held inadmissible: reasonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative. Id., at 211-212, 60 L Ed 2d 824, 99 S Ct 2248. Brown v Illinois, 422 US 590, 45 L Ed 2d 416, 95 S Ct 2254 (1975), and Davis v Mississippi, 394 US 721, 22 L Ed 2d 676, 89 S Ct 1394 (1969), are to the same effect," [emphasis added]

On page 238, of the decision this Court said the following with respect to voluntary statements given during unlawful detention.

> "*Fifth, Dunaway and Brown hold that statements given during a period of illegal detention are inadmissible even though voluntarily given it they are the product of the illegal detention and not the result of an independent act of free will.* Dunaway v New York, 442 US, at 218-219, 60 L Ed 2d 824, 99 S Ct 2248; Brown v Illinois, supra, at 601-602, 45 L Ed 2d 416, 95 S Ct 2254. In this respect those cases reiterated one of the principal holdings of Wong Sun v United States, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407 (1963)." [emphasis added]

In upholding the lower Court, this Court held on page 239:

> "... when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment.
>
> These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.' United States v Mendenhall, 440 US, at 554, 64 L Ed 2d 497, 100 S Ct 1870 (opinion of Stewart, J.) (footnote omitted)."

It was the opinion of this Court, that any consentual aspects of Royer's responses to the detectives requests to search his luggage had "evaporated" under the circumstances confronting him in a private room.

In Martindale, the customs officers identified themselves to Martindale, asked him to accompany them to a private room. Agent Fanning openly admitted that he was suspicious that Martindale might be bringing some weapons in to the country. In addition, he wanted to interview him regarding the weapons charge in London. The agent had Martindale's traveling papers and passport. Obviously the defendant could not go anywhere without these important documents. Martindale was confronted by two customs agents in a private room and required to submit to a 100% search. These circumstances surely amounted to a show of official authority such that "a reasonable person would have believed that he was not free to leave." *U.S. v. Mendenhall*, supra. Any statements given during such an illegal detention are inadmissible even though voluntarily given as they are the product of the illegal detention and

not the result of an independent act of free will. *Florida v. Royer,* supra.

It is respectfully submitted that statements given to the customs agents were in violation of the defendant's *Miranda* rights and were the product of an unlawful detention and therefore, their admission into evidence, at trial, constitutes reversible error.

CONCLUSION

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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128 N. Pitt Street
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Attorneys for Petitioner
Walter Reed Martindale

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CRIMINAL ACTION
NO. 84-00161-A

UNITED STATES OF AMERICA
-vs-

WALTER REED MARTINDALE, III,
Defendant.
Friday, October 5, 1984

Alexandria, Virginia

THE COURT: The motion to suppress will be denied.

I don't think even the lengthy interrogation establishes, when you consider all the circumstances, any involuntariness. The Miranda rules I don't believe are applicable to an inquiry, even a custodial inquiry, made of citizens abroad.

I think, as counsel seem to recognize, that it is the totality of the circumstances. I think that under these circumstances, given the information the officers had, the denial of any request for a telephone was warranted, as was the denial of a right to counsel prior to any charge being made.

The fact that he was held by the arm is really irrelevant to any voluntary or involuntary determination. There is no indication that it was done coercively. I reject the notion that it was coercive.

People who may have come in or out of the room don't seem to me to have affected the totality of the circumstances insofar as creating a coercive atmosphere. I am satisfied that the atmosphere of the interviews were, while probably not pleasant to be in custody and a prisoner, nevertheless were sufficiently relaxed, uncoercive, the absence of any threats, promises, to make, when the entire circumstances are considered, any statements he made on October 25 and 26 understandingly and voluntarily made.

For these reasons, the motion to suppress will be denied.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Cr. No. 84-161-A

UNITED STATES OF AMERICA,
-vs-

WALTER REED MARTINDALE, III,
Defendant.

JURY VERDICT

October 13, 1984

Before: ALBERT V. BRYAN, JR., Judge

And a Jury

APPEARANCES:

Justin W. Williams, Counsel for the United States

Paul Kramer and J. Thomas Burch, Jr., Counsel for the Defendant

The defendant, Walter R. Martindale, III, in person

NOTE: At this point, 5:48 p.m., the October 13, 1984 portion of the case begins with the jury returning to the courtroom and the case continuing as follows:

JURY IN

THE CLERK: Mr. Foreman, has the jury agreed upon the verdicts?

JUROR REILAND: Yes, ma'am, we have.

THE CLERK: May I have them, please.

JUROR REILAND: Yes.

THE CLERK: Will the defendant please stand and face the jury. Criminal number 84-161-A, the United States of America versus Walter Reed Martindale, III, defendant. We the jury find the defendant guilty on count one, signed Richard K. Reiland, foreman, dated October 13th, 1984.

Ladies and gentlemen of the jury, is this your unanimous verdict?

NOTE: The jurors all respond affirmatively.

THE CLERK: United States of America versus Walter Reed Martindale, III, defendant. We the jury find the defendant not guilty on count two, signed Richard K. Reiland, foreman, dated October 13th, 1984.

Ladies and gentlemen of the jury, is this your unanimous verdict?

NOTE: All the jurors respond affirmatively.

THE CLERK: United States of America versus Walter Reed Martindale, III, defendant. We the jury find the defendant guilty on count three, signed richard K. Reiland, foreman, dated October 13th, 1984.

Ladies and gentlemen of the jury, this is your unanimous verdict?

NOTE: All the jurors respond affirmatively.

THE CLERK: United States of america versus Walter Reed Martindale, III, defendant. We the jury find the defendant not guilty on counted four, signed Richard K. Reiland, foreman, dated October 13th, 1984.

Ladies and gentlemen of the jury, is this your unanimous verdict?

NOTE: All the jurors respond affirmatively.

THE CLERK: United States of america versus Walter Reed Martindale, III, defendant. We the jury find the defendant guilty on count five, signed richard K. Reiland, foreman, dated October 12th, 1984.

Ladies and gentlemen of the jury, is this your unanimous verdict?

NOTE: All the jurors respond affirmatively.

THE CLERK: United States of america versus Walter Reed Martindale, III, defendant. We the jury find the defendant guilty on count six, signed Richard K. Reiland, foreman, dated October 12th, 1984.

Ladies and gentlemen of the jury, is this your unanimous verdict?

NOTE: All the jurors respond affirmatively.

THE CLERK: United States of america versus Walter Reed Martindale, III, defendant. We the jury find the defendant guilty on count seven, signed Richard K. Reiland, foreman, dated October 12th, 1984.

Ladies and gentlemen of the jury, is this your unanimous verdict?

NOTE: All the jurors respond affirmatively.

THE CLERK: United States of America versus Walter Reed Martindale, III, defendant. We the jury find the defendant guilty on count eight, signed Richard K. Reiland, foreman, dated October 12th, 1984.

Ladies and gentlemen of the jury, is this your unanimous verdict?

NOTE: All the jurors respond affirmatively.

THE CLERK: United States of America versus Walter Reed Martindale, III, defendant. We the jury find the defendant guilty on count nine, signed Richard K. Reiland, foreman, dated October 13th, 1984.

Ladies and gentlemen of the jury, is this your unanimous verdict?

NOTE: All the jurors respond affirmatively.

THE COURT: Any objection to the form of the verdicts?

MR. KRAMER: Not to the form, Your Honor.

THE COURT: Any request that the jury be polled?

MR. KRAMER: Yes, sir.

THE COURT: As your name is called, will you answer in the affirmative if these are your individual verdicts as well as your collective verdicts.

NOTE: All the jurors are polled individually, and each juror responds that these are their verdicts.

THE COURT: The jury is released and discharged. The Court wants to thank you for your service. Sorry we have upset your weekend, you have labored long and hard, and you look tired. It is hard work, I know. If there are any of you who feel that you, because of this intrusion on a whole week of your life, makes it that you would rather not serve any longer in this term, if you will let the Clerk know, I will instruct the Clerk to excuse you from further service on request.

You are released. The Court wants to thank you for your services. The Court will stay in session while the jury leaves the room.

NOTE: At this point, 5:54 p.m. the jury is discharged and leaves the courtroom, whereupon the case continues as follows:

JURY DISCHARGED

THE COURT: Any motions?

MR. KRAMER: Your Honor, I am assuming it is a motion for continuation of bond at this stage. I would hope

that Your Honor would agree and the Government wouldn't disagree that he remain on the bond that he is on. I can't imagine him going anyplace, it is not his nature. And I would add, he has always been very prompt and we could always get a hold of him. He has his home here, he has his family here. I am not sure the Government is going to ask otherwise, but I would ask that he remain on bond while we get a presentence report and while we file, I would assume we will be filing motions for new trial based on the fact that he was found guilty of some. And we have to work out the, what we feel are some of the inconsistencies. But at this point I assume I am addressing Your Honor's question was dealing with bond?

THE COURT: That was not my question. I just wanted to know if you had any motions. If not, I will enter judgment of conviction on the verdicts. You can file any motion or motions that you desire within the time described by the rules.

I will refer the matter to the probation service for a presentence investigation and report. I will continue the case for sentencing until November 9th, if that is an agreeable date to counsel.

MR. WILLIAMS: Your Honor, would it be possible to have the, any other date but the 9th. I believe I am going to be away. Possibly the next week?

THE COURT: November 16th?

MR. KRAMER: Your Honor, I would have a problem, I am starting a major case on the 13th against, representing a state Senator in Maryland that starts on the 13th.

THE COURT: November 2nd.

MR. KRAMER: That is the only other date available? That's fine, sir.

MR. WILLIAMS: That will be fine.

THE COURT: I will refer the matter to probation, and it will be set at 9 o'clock on November 2nd.

MR. KRAMER: Your Honor, if I could, I know it is seven days for filing for a new trial. I believe we can file appropriate motions by then, but I would like to ask for ten days, in case there is something I don't foresee coming up next week.

THE COURT: I will grant you ten days. Does the government want to be heard on the question of bond?

MR. WILLIAMS: Yes, Your Honor. Your Honor, I feel that at this point the defendant, having been convicted of seven counts, including the conspiracy count, I feel I have no choice but to move the Court to revoke the defendant's bond. We would be concerned about flight.

In the alternative, the only alternative we could think of to that, if the Court is unwilling to revoke the defendant's bond, would be to secure the defendant's presence, if not by a surety bond, at least by a property, bond, sufficient property bond on his, on his home or property that he has here.

I do not feel that it would be adequately protected just with the personal bond. This defendant having lived all over the world, we think it would be rather easy for him, given this posture, to disappear.

And we would also be concerned possibly because there are other, we feel there are other conspirators out there and this very well may be the best place for him too.

THE COURT: What does counsel for the defendant have to say about the alternative to fixing bail?

MR. KRAMER: Well, Your Honor, certainly we would be able to do it I think early next week. He does own a home here, and I am sure that can be worked out. I don't think that is necessary. He is certainly not going to run, he is not going to hide anywhere. He is the kind of person

that will face whatever has to be faced. And I just can't imagine, with everything we know about him, that he would in any way run. Obviously we want an opportunity, if Your Honor feels he has to put up some kind of property bond, it is just the aspect of letting us work it out. But I think—

THE COURT: I think some bond is appropriate.

MR. KRAMER: If I could suggest a bond on a signature of "x" amount of dollars for him to sign. He is on a personal bond. I don't think there is any money amount to it. We have no objection to that so there would be a judgment against him should he run, but he wouldn't. If the Court feels it is necessary, I am sure he could put his property up as security.

THE COURT: I am perfectly willing to accept a property bond. But I will fix bond at $25,000 cash, corporate surety, or property. And he is remanded to the custody of United States Marshal pending that bond.

MR. KRAMER: Your Honor, could we ask, since it is a weekend, that he be allowed to post it, at least work out the mechanics on Monday so he doesn't have to be in jail tonight and tomorrow. I just can't imagine him going anywhere. It is a mechanical thing. If it was a weekday, I am sure we could work it out. But you have to sign the papers on his house, his parents are both here from Florida, they could help sign. And they could work on it obviously tomorrow. Sunday is very hard. We would ask Your Honor's indulgence. The bond is fair, it is just a matter working it out, not to lock him up over the weekend while we are trying to work these things out.

THE COURT: I think it is important that there be a bond. I think it is just as important immediately as it will be next week. He is remanded to the custody of United States Marshal pending making of bond.

The court will stand adjourned until Monday morning at 10 o'clock.

HEARING CONCLUDED

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

/s/ NORMAN B. LINNELL,
NORMAN B. LINNELL, RPR CP CM CE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-5329

UNITED STATES OF AMERICA,

Appellee,

versus

WALTER REED MARTINDALE, III,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (CR 84-00161-A)

Argued: October 11, 1985. Decided: May 21, 1986

Before RUSSELL, PHILLIPS and MURNAGHAN, Circuit Judges.

Blair Howard (John Frank Leino; Howard & Howard, P.C. on brief) for Appellant; Justin Williams, Assistant United States Attorney (Elsie L. Munsell, United States Attorney; David B. Smith, Trial Attorney, U.S. Department of Justice on brief) for Appellee.

RUSSELL, Circuit Judge:

This is a bizarre case of mystery and high Mideastern intrigue reminiscent of a James Bond novel. We sketch

the facts of the story only to the extent that they are necessary to an understanding of the issues on appeal.

The central figure in the case and the defendant on appeal is a former officer in the State Department. He served apparently in an intelligence capacity of some importance in both the Middle East and Vietnam. During this time, he enjoyed diplomatic status and traveled under a diplomatic passport. A few years before the incidents which led to his prosecution, he either resigned or was terminated from government service. According to his testimony, he then engaged in private trading, being associated with a Middle Eastern group in some nebulous or indefinite ventures never entirely disclosed. In connection with his employment with this group, he undertook a careful and extensive surveillance of a member of a prominent Saudi Arabian family, the Al-Fassils, who resided on the outskirts of London. The defendant gave a number of reasons, none free of doubt, for the surveillance. He suggested at his English interrogation that his group was interested in inducing Mr. Al-Fassi to become a co-investor. He had early on, however, confided to a retired Government intelligence agent, Goodman, with whom he had worked while employed by the Government, that he had been asked by Sheik Ibrahim Al-Rawaf to arrange an assassination in London. He indicated that a "Prince Naif" was the financial backer of the enterprise. He requested Goodman to review the planning for what was described felicitously as "this operation." Goodman actually visited London with the defendant for this purpose. While there Goodman contacted a Vietnamese Phuc, whom both Goodman and the defendant had known in Vietnam. The three met and the defendant indicated to Phuc that he (the defendant) might have some work for him and other vietnamese in the area.

Sometime later, on returning to Alexandria, Virginia, the defendent told Goodman to ask Brookshire, a retired Army officer who had served with the two of them in Vietnam, to secure for him (the defendant) an Uzi semi-

automatic or automatic gun of Israeli manufacture. The defendant explained he sought this gun for a foreign national who would be taking it permanently out of the United States. Brookshire secured the Uzi gun as requested and, with the assistance of another mutual friend, delivered it to the defendant at a meeting in Petersburg, Virginia. At this time, the defendant's story to Goodman was that the gun was intended for a bodyguard of Al-Rawaf. The defendant later telephoned Goodman from London, told him he had "the items," which Goodman understood to refer to the gun, and secured from him (Goodman) the name of the Vietnamese individual whom they previously had seen in London. The defendant proceeded to communicate with Phuc and sought to engage him in his surveillance of Al-Fassi. The defendant allegedly used the word "kidnap" in connection with the intended surveillance, though the defendant denies Phuc's testimony on the use of the word "kidnap." Phuc did not initially understand the word "kidnap" according to his testimony but, having become suspicious or the defendant and his project, he consulted a Vietnamese friend who told him the meaning of "kidnap." Concerned, Phuc determined to consult Scotland Yard. He was instructed by Scotland Yard to maintain contact with the defendant.

On his next visit to Phuc's residence, the defendant brought with him an attache box, which he explained to Phuc contained a radio to be given to a friend in the Mid-East and which he wished to leave with Phuc for a couple of weeks. Phuc accepted the box but, as soon as the defendant left, he called Scotland Yard which took possession of the attache box, opened it and discovered both the Uzi gun, a .38 calibre revolver, and ammunition for both weapons. At this point, Scotland Yard determined to break the case.

Officers of Scotland Yard took the defendant into custody and, with defendant's consent and after giving him the appropriate warnings under British law, interrogated

him at some length. The defendant made many statements during this interrogation. He was later formally charged and plead guilty to firearms possession. After being held for another thirty days, he was released and allowed to board a plane to the United States without any passports (they having been seized) but with authority to travel granted by the United States Embassy in London.

On arrival in the United States, the defendant was interviewed by the Customs authorities and about a week later he was interviewed by Special Agent Pederson of the Bureau of Alcohol, Tobacco and Firearms. This was followed by the indictment of defendant on nine counts. One count charged a conspiracy to violate the Gun Control Act of 1968; two counts charged the defendant with shipping a firearm in interstate commerce and in foreign commerce with intent to commit a felony; one count charged knowing receipt of an Uzi rifle in Virginia after having caused the rifle to be purchased outside Virginia; one count charged knowing delivery of a firearm to a common carrier for shipment in foreign commerce without written notice to the carrier; two counts charged unlawful use of a diplomatic passport; and, finally, two counts charged impersonating a State Department employee. After a trial he was convicted of seven of the counts and acquitted of two. Subsequent to sentence, he appealed the judgment of conviction.

The defendant's principal objections on appeal are directed at the admission in evidence of (1) the personally signed transcript of his interviews by British officers at Scotland Yard in London, (2) of his interview with the Customs officers when he returned to the United States after his British prosecution, and (3) of his interview at his own office by Officer Pederson. We shall consider in their order these several objections first.

In their interrogation of the defendant, the British officers were engaged in the lawful pursuit of a separate

and valid investigation into activities involving a violation of British law and conducted in compliance with British law. Of this there seems to be no dispute. Before the interrogations began, the British officers gave the customary British caution, advising the defendant that "he needn't say anything unless he wished to do so, but what he did say would be taken down in writing and may be given in evidence." There was no requirement on the part of the British officers of compliance with the rule either in *Miranda v. United States,* 384 U.S. 436 (1966), or in *Massiah v. United States,* 377 U.S. 201 (1964), and any admissions made by the defendant in the interviews by the British officers were admissible absent proof of duress or of a willful attempt of American authorities to evade the strictures of *Miranda* or *Massiah* by employing the foreign authorities. *United States v. Bagaric,* 706 F.2d 42, 69 (2d Cir.), *cert. denied,* 464 U.S. 840 (1983). The reason for such rule was stated in *United States v. Chavarria,* 443 F.2d 904, 905 (9th cir. 1971):

> *Miranda* was intended as a deterrent to unlawful police interrogations. When the interrogation is by the authorities of a foreign jurisdiction, the exclusionary rule has little or no effect upon the conduct of foreign police. Therefore, so long as the trustworthiness of the confession satisfies legal standards, the fact that the defendant was not given *Miranda* warnings before questioning by foreign police will not, by itself, render his confession inadmissible.

The district judge held an evidentiary hearing on the issue of duress in connection with the British interviews and, after such hearing, found no arrest. That finding of the district judge is reversible only for clear error. *United States v. Dodier,* 630 F.2d 232, 236 (4th Cir. 1980). The ruling of the district judge against duress was not clearly erroneous. It must be noted that the defendant is a well-educated, sophisticated individual with wide experience in

the intelligence field. There is no reason to assume he was unaware either of his rights or of his surroundings. He had undoubtedly participated in investigations himself and suffered under no handicaps of inexperience, immaturity, or impaired competency. When asked if he would talk to the British officers, he had readily agreed. The interrogation was cordial throughout. Further, it must be remembered that the entire interrogation was typed and the defendant was given the opportunity to read it and verify the accuracy of the transcript. He did that and he signified his agreement with all the statements in the transcript by signing the transcript without any reservations.

The only fact that the defendant adduces in support of his argument of duress is that during the interrogation he was denied the right to use a telephone. One of the British officers explained the reason for this denial and his explanation was accepted by the district judge as reasonable and credible. The denial of the use of a telephone was clearly not intended by the British officers to coerce the defendant. The facts being developed in the investigation indicated an extensive plot either to murder or kidnap an individual. Manifestly there were other parties necessarily involved in the operation in addition to the defendant. The officer feared that, if the defendant were allowed to use the telephone, the defendant might communicate with his confederates and alert them that the officers had discovered the plot and had placed him in custody. The result of such premature discovery could well thwart the officers' ability either to prevent the crime or to apprehend and arrest others involved.[1] Such reason appears reasonable. Plainly the denial was not intended to coerce the defendent nor, in the opinion of the district judge, did it coerce him. We, therefore, affirm the district court's rejection of the

[1] There is a statement in the record that the entire operation unraveled as a result of the investigation of the defendant, leading to the indictment in england of the defendant's associate, Ibrahim Al-Rawaf.

motion of the defendant to suppress the transcript of the defendant's British interrogation either under the *Miranda* rule or for duress.

The defendant further objected to the introduction of his British interrogation because the statements given by him during the interrogation were not confessions but were in fact simply denials of wrongdoing and therefore exculpatory. As such, he urges they were inadmissible. We, however, have often held that exculpatory statements of the defendant, if shown to be false and fabricated "are clearly admissible to prove [the defendant's] guilty state of mind," and as "evidence of guilt," of "illicit intent" and of "consciousness of guilt."[2] *United States v. Hughes*, 716 F.2d 234, 240-41 (4th Cir. 1983); *United States v. Williams*, 559 F.2d 1243, 1249 (4th Cir. 1977); *United States v. Abney*, 508 F.2d 1285, 1286 (4th Cir.). *cert. denied*, 420 U.S. 1007 (1975); *United states v. Wilkins*, 385 F.2d 465, 472 (4th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968). To the same effect are the decisions of other circuits. *United States v. Meyer*, 733 F.2d 362, 363 (5th Cir. 1984), and cases therein cited.

The defendant offered as a further objection to the admission of the transcripts the references to statements made by Phuc in the questions addressed to the defendant by the British agents. These transcripts were offered after

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[2] The court in *United States v. Di Stefano*, 555 F.2d 1094, 1104 (2d Cir. 1977) said:

> False exculpatory statements are not admissible as evidence of guilt, but rather as evidence of consciousness of guilt.

This is contrary to the rule as stated by us in *United States v. Williams*, *supra*, and in *United States v. Abney*, *supra*. However, *Di Stefano* did not find the evidence of false exculpatory statements inadmissible; its ruling related only to jury instruction on the effect to be given such evidence. The instruction of the district judge on the weight to be accorded such evidence is not in issue in this case and *Di Stefano* is therefore not opposite.

Phuc had testified and, so far as they related to Phuc's testimony, were similar to his earlier testimony at trial. It is the defendant's objection that this repetition of Phuc's testimony in the phraseology of the agents' questions represented an impermissible attempt to bolster the credibility of Phuc's testimony and, as such, was inadmissible under the rule stated in *Dowdy v. United States*, 46 F.2d 417, 424 (4th Cir. 1931):

> [T]here can be no doubt that in modern times the general rule is that a witness cannot be corroborated by proof that on previous previous occasions he has made the same statements as those made in his testimony.[3]

the defendant, however, overlooks that this evidence was not offered to bolster or corroborate Phuc's testimony, but was offered and admitted merely "to put the question [then being answered] by the defendant in context," in short, indicating what he was responding to. That was the sole purpose of including any reference to Phuc in the questioning. The district judge carefully cautioned the jury that it was "not to accept the truth of [such statement] as what Phuc did actually say." That instruction was given at the instance and on the request of the defendant. We find no error here.

The admissibility of defendant's statements to the Customs agent, Fanning, and to the DEA agent, Pederson, is also questioned by the defendant on this appeal because those statements were secured without giving the defendant the *Miranda* warnings. The flaw in this argument is that on neither occasion was the defendant *in custody*. *Miranda* is applicable only in cases where the defendant is in custody. *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980). In both interviews the defendant freely

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[3] *See* in this connection, our opinion in *United States v. Parodi*, 703 F.2d 768, 785-87 (4th Cir. 1983).

consented to answer the agent's questions. He was thus under no restraint; he was subjected to no coercive action, either in word or deed. He was at liberty to terminate the discussion and to go his way anytime he chose to leave. He was neither under arrest nor in any type of custodial situation in either case. In fact, the Pederson interview was in the defendant's own office. The district judge found that the defendant's voluntary statements made under those circumstances were admissible.

It is defendant's position, though, that the Pederson interview was actually sufficiently custodial to require *Miranda* warnings since at the time, the defendant was the target of a grand jury investigation. Pederson denied that the defendant was known to him to be a target of a grand jury investigation. At the time of the interview, he knew no more of the defendant's involvement than was set forth in a recent article in the *Washington Post* and that he had been given a subpoena to serve on the defendant. He inquired of the defendant about the article. The defendant proceeded unhesitatingly to give the same story he had already given the British officers and Mr. Fanning. It was, also, the same story the defendant gave in a later interview when his attorney was present. We find no error in the finding of the district judge that the defendant's statements, statements already proved by other witnesses, as given to Officers Fanning and Pederson, were entirely voluntary. *See United states v. Olmstead,* 698 F.2d 224, 226-27 (4th Cir. 1983); *United States v. Wertz,* 625 F.2d 1128, 1133-35 (4th Cir.), *cert. denied,* 449 U.S. 904 (1980).

The defendant has advanced the argument that his conviction under the conspiracy count (Count One) is inconsistent with his acquittal under the substantive counts (Counts Two and Four) and, therefore, must be voided. Implicit in this contention is the assumption that the conspiracy offense is the same as the substantive offenses in Counts Two and Four. The initial fallacy in this argument is its failure to recognize that the offense of conspiracy

is a separate and distinct offense from the substantive offense or offenses and that one can be validly convicted under a conspiracy count even though acquitted of the substantive offense or offenses. *Iannelli v. United States,* 420 U.S. 770, 777-82 (1975). As the Court said in *United States v. Goldberg,* 756 F.2d 949, 958 (2d Cir. 1985): "A substantive offense and a conspiracy to commit that offense are separate and distinct crimes (citing cases). A defendant thus may be convicted of the crime of conspiracy even if the substantive offense was not actually committed." It has long been the rule that inconsistency is not a ground for voiding a verdict of conviction. There may be a number of reasons why a jury may reach what may appear to be inconsistent verdicts but, so long as the evidence clearly supports the guilty verdict, inconsistency is no ground for invalidating the conviction. This was authoritiatively settled by the Supreme Court in *Dunn v. United States,* 284 U.S. 390, 393 (1932), quoted and followed by us in *United states v. Harris,* 701 F.2d 1095, 1103 (4th Cir.), *cert. denied,* 463 U.S. 1214 (1983):

> Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. . . . .
>
> The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.

Finally, the defendant premises his contention in this regard on the assumption that the only substantive offenses related to the conspiracy are those charged in Counts Two and Four. This is in error. The conspiracy count

charged had as its purpose the violation of various sections of the federal firearms statute. These violations were broadly divided into two groups: one dealt with foreign commerce, that is, with the transportation by air of the firearm from Alexandria, Virginia, to London, England; the second involved the transaction in interstate commerce as charged in Counts three and Nine. The defendant was acquitted of the foreign commerce counts but—and this is what the defendant would disregard in this argument—he was convicted under all the substantive counts relating to interstate commerce. It is well settled that, where there is a conspiracy to violate two or more alleged criminal statutes, the jurors may properly convict if they find that the defendant conspired to violate any one of the statutes. This principle has been clearly stated in *United States v. Wilkinson,* 601 F.2d 791, 796 (5th Cir. 1979):

> A single conspiracy may have several objectives (citing cases). When a conspiracy to violate two statutes is alleged, the jury may find the defendant guilty if they believe beyond a reasonable doubt that he or she conspired to violate either one of the statutes.

It follows that, even if conviction on at least one of the substantive counts was essential to a conviction of conspiracy in this case (a conclusion which, incidentally, we have already found incorrect), there was such a conviction and the conspiracy conviction would not be vulnerable to attack.

There is some suggestion by the defendant, too, that the conspiracy conviction must be voided because there was a lack of proof of the commission of a murder. As *Goldberg, supra,* makes plain, proof of the commission of a murder is not required for conviction under the conspiracy count. The defendant was not charged with murder; he was indicted and convicted of conspiracy, as the

district judge correctly declared in overruling this point raised by the defendant at trail.

Finally, the defendant assails his conviction of impersonating a federal officer or employee in violation of 18 U.s.C. § 912. the defendant used his diplomatic passport not only in passing through Customs in London, England, but also in identifying himself on at least three occasions when registering at London hotels as being with the "State Department," in presenting his diplomatic passport and asking for a discount as a U.S. Sate Department employee at Hertz Rent-A-Car at Gatwick Airport in England, and in receiving as such an employee a twenty-five per cent discount. This conduct on his part met the two-pronged test for conviction under section 912 as phrased in *United States v. Parker,* 699 F.2d 177, 178 (4th cir.), *cert. denied,* 464 U.s. 836 (1983). *See also United States v. Cohen,* 631 F.2d 1223 (5th cir. 1980), *rehearing denied,* 636 F.2d 315 (1981); *United States v. Robbins,* 613 F.2d 688 (8th Cir. 1979); and *United States v. Hamilton,* 276 F.2d 96 (7th Cir. 1960).

For the reasons stated herein, we affirm the rulings of the district court and the defendant's conviction under the indictment.

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-5329

UNITED STATES OF AMERICA,

Appellee,

versus

WALTER REED MARTINDALE, III,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

FILED
JUL 3 1986

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell for a panel consisting of Judge Russell, Judge Phillips and Judge Murnaghan.

For the court,

/s/ JOHN M. GREACEN
JOHN M. GREACEN
CLERK

APPENDIX E

F.R.E., Rule 801 and 802 provides:

Rule 801. Definitions. The following definitions apply under this article:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements Which Are Not Hearsay.* A statement is not hearsay if:

(1) Prior Statement by Witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by Party-Opponent.—The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter

within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a conspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay Rule. Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress
4th Amendment to the Constitution of the United States provides:

[AMENDMENT IV]

[*Security from Unwarrantable Search and Seizure*]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
28 U.S.C. 1254(1) provides:

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RECORD NO. 84-5329

WALTER REED MARTINDALE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ORAL ARGUMENT

BEFORE:Judge Murnaghan
Judge Phillips
Judge Russell

July 28, 1986

Appearances:

HOWARD & HOWARD

By: BLAIR D. HOWARD, ESQ.

128 N. Pitt Street

Alexandria, Virginia 22314

U.S. ATTORNEY'S OFFICE

ASSISTANT U.S. ATTORNEY

By: JUSTIN W. WILLIAMS, ESQ.

701 Prince Street

Alexandria, Virginia 22314

(The following transcript prepared by an electronical recording.)

HE COURT: Mr. Howard, we have read the briefs in this case. We are fairly familiar with the facts.

MR. HOWARD: Yes, sir.

THE COURT: You can come straight to your legal issues if you like, and I think relate to the discussion of certain testimony.

MR. HOWARD: The statement. Yes, sir. If I may preface my remark, one thing; a decision was handed down by this Court on a case of the United States versus Alex Brown in July, which I feel is very pertinent to argument 3, and I submitted a letter and copies that I would like with the Court's permission and indulgence to be able to argue that.

THE COURT: Very well. Go ahead.

MR. HOWARD: All right, sir. On my argument number 1, October 23, 1983, he was arrested in Gatwick Airport in England, and he was taken by British investigators.

THE COURT: He made these statements prior to --

MR. HOWARD: He made these statements on two dates. The statement, I believe, the first statement was approximately six hours, eight hours a second date. Fourteen hours of statements. He was never advised of Miranda rights. Now, I can see right from the outset that Miranda does not apply to outside -- statements made outside court, however --

THE COURT: I thought he did receive the advice, which has been in existence for many years in Britain, that anything he said might be used against him in the course of any criminal proceedings which might follow.

MR. HOWARD: Yes, sir, but he was --

THE COURT: We can't dictate to Great Britain how it's going to conduct its affairs anymore than, as an Irishman, I am glad to say, Great Britain can't dictate to us how we are to conduct our affairs, and it seems to me that an attempt to export the American Miranda warning to the way in which a Court proceeds -- which court proceedings take place in a country, particularly a country like England, that not only has a law similar to ours, but a law which was the genesis of ours, merely to make an argument that has no appeal, none to me.

MR. HOWARD: Yes, sir. Well, I respectfully just say this, sir, that I believe during the course -- in the beginning of the second day, he asked to make a phone call. He reminded the investigators that on the preceding day he had also asked to make the phone call. They denied him the right to make any phone calls.

THE COURT: What is the English practice in cases where people are under custody and has to make a telephone call?

MR. HOWARD: I believe it is discretionary with the investigators --

THE COURT: But sometimes they do and sometimes they don't.

MR. HOWARD: Yes, sir. My only point is this, that I believe the cases that hold that you cannot apply Miranda outside of this country, also hold that you are to look at the totality of the circumstances to see if there is any compulsion.

THE COURT: The cases don't really say that you can't apply Miranda or there's a failure to apply Miranda. Miranda is the scheme or rule which has been established as an American proceeding, because of the peculiar nature of our courts and police activity in this country.

MR. HOWARD: Yes, sir.

THE COURT: The purpose is to warn someone that he has a Fifth Amendment right or its equivalent in Great Britain, which proceeded the fifth Amendment, not to give up (inaudible) because that's clearly made evident by British police authorities who take someone in custody. That warning was given to him explicitly and clearly, and that amounts to the equivalent of Miranda in the English circumstances surrounding it.

MR. HOWARD: Yes, sir. I will not dwell on that point, other than to say that I believe he verbalized his desire to communicate, which was denied.

THE COURT: All right, sir. Go ahead.

MR. HOWARD; Argument number 2. In argument number 2, Your Honors, is in conjunction, really, with argument number 3, that is, the contents of Exhibits 27 and 27(a). They were the two statements themselves. Now, at the time Mr. Williams asked those be offered in evidence, there was quite an exchange at the bench between counsel and Judge Bryant as to the contents of these statements that are -- not withstanding of fact that Mr. Phuc testified, not withstanding the fact that all these investigators from England have come over here and testified --

THE COURT: They still were admissions, were they not?

MR. HOWARD: No, sir.

THE COURT: They just took down what he had had to say.

MR. HOWARD: They were admissions that he was at certain places at certain times, and that he did certain things. As I pointed out, sir, an admission necessarily is not a confession. it --

THE COURT: (inaudible) almost anything that you say may be introduced under what would otherwise be hearsay

and admissable, a condition to point to what you have said.

MR. HOWARD: All right, sir. If I may specifically get to what I feel objects from what was (inaudible) the attorney that (inaudible) Mr. Kramer. There was a number of statements contained in these statements that were offered in 27 and 28 -- 27(a), specifically --

THE COURT: Statements by the defendant?

MR. HOWARD: Statements by the investigators. Comments that they made, speeches that they made to him.

THE COURT: Any responses which he made to them?

MR. HOWARD: Yes, sir. To them, but if I may direct the Court's attention, please. Page 207. This is a statement one of the men from Scotland yard made to him. What you have been doing has not been in connection with any genuine business concern. You have done the ground work and detail filing instructions in a plan to kidnap Al-Fassi. I submit to you that was a statement of conclusion. It was highly prejudicial. It would not have been allowed if the investigators were asked that question -- if it were in Court.

THE COURT; What was the answer?

MR. HOWARD: The answer was, no. That is wrong. Then, on page 211, he asks this, the investigator goes on to say this; the point I was trying to make was that yesterday in reply to Investigator Burke's questions, you said you were a backer for the project, then in fact you have no collateral for such a project. Your client at that time was a liar, and your intention as regards the Al-Fassi family has been want of kidnap.

Again, these were statements of conclusion, it went to, certainly, the issue, the heart of the issue that was before the jury. Highly prejudicial. (Inaudible) And I respectfully say that that was brought to Judge Bryan's attention, but

there were other speeches made. These are just two examples of statements made by the investigators. In addition to this, and this goes right to your Brown decision in July --

THE COURT: (Inaudible) to treat them as a question, does he not?

MR. HOWARD: Yes, sir. He did respond with, no, that is not true, that I had no such intention; my intentions were legitimate business interests.

Then, he was confronted with a number of quotes from this witness Phuc who was one of the key witnesses for the government, and he was repeatedly asked, well, Phuc says that you are going to bring a gang of Cubans over here. Phuc says that your intention is to kidnap. Phuc says that you are going to do this and Phuc says that you are going to do that, all of which he did not. The point is, Mr. Phuc, was called as a government witness first. He was examined at length by Mr. Williams as to every statement Mr. Rockmore had made to him. He answered of Mr. Williams' questions. He was cross-examined.

Then, the various investigators were called with the strategy the government was to take these statements and to go to specific parts and ask the investigators, didn't Mr. Martindale say this or didn't Mr. Martindale say that? After all that was done, gentlemen, Mr. Williams then offered the statements themselves containing the statements of Phuc, containing the statements, the little speeches of the investigators.

We feel there were numerous reasons why this was wrong. Specifically, all these people who testified, and in the case cited in my brief out of this circuit, I think that the majority rule and throughout the Federal Court System is that you do not introduce in the case in chief prior consistent statements of a witness out of Court to cor-

roborate their in-court testimony, so I think it was wrong from that standpoint.

The other thing that I pointed out in my brief is in the pretrial motions, and before Judge Bryan, Investigator Burke from Scotland yard was asked, when you took this statement from Phuc, the circumstances, and he said, well, we couldn't understand what Mr. Phuc said, therefore, we used an interpreter, so essentially, everything that the investigators were confronting Mr. Martindale with was once removed, in other words, it was hearsay through an interpreter. It wasn't the statement that Phuc made directly to these investigators, so essentially, the bottom line is what these statements contained were statements that Phuc gave to an interpreter, the interpreter purportedly quoting Mr. Martindale, which in turn --

THE COURT: But the interpreter isn't suppose to be quoting exactly. He is translating him directly, and under your theory anytime we have an interpreter who gives a statement of what the person said, we have to assume that's hearsay.

MR. HOWARD: Yes, sir, but --

THE COURT: (Inaudible)

MR. HOWARD: That's exactly what the problem was, because during the course of the trial, when Mr Phuc was on the stand on cross-examination, Mr. Kramer asked about this word, " kidnap". There were two statement Phuc gave to them. One was in Japanese, one was in English. When they got to the word that purportedly meant kidnap, the interpreter right there in the courtroom said, that word could have been caught, capture, arrest, or kidnap. It depends on the context in which it was used. We don't know that the time that those statements were taken from Fukes, in what context the questions were asked and --

THE COURT: (Inaudible) raised captured or kidnapped?

MR. HOWARD: Yes, sir. I think that's very material. Absolutely. Everything depends on the context, but as you pointed out in the parallels between what Judge Bryant said at the bench and your opinion in Brown to me was startling when I read your opinion in the Brown case. The same approach --

THE COURT: What does Brown hold? I don't know.

MR. HOWARD: I am very sorry, sir. Brown was the case that was the short case down in Norfolk where an investigator named Thomason had information through an informant that shrimp was being taken off base, (inaudible) and what essentially happened in that case what that they set the whole thing up, they caught the truck driver, got him (inaudible) they stopped him, caught him read handed, and they said, you cooperate with us, we'll get Brown, who was the ultimate defendant. And they had him sell Brown the stolen shrimp, got the money and then they arrested Brown.

They put THomason on the stand, did the same thing in that case that they did up here in the Martindale case. They put Thomason on the stand and Thomason said, number one, he quoted what the police on the base had told him. He quoted what the police said what Norris said that Brown said. He quoted what Norris said that Brown had said. He -- numerous instances -- he was -- they were getting quotes of the defendant on the ultimate issue of the stolen shrimp through other witnesses.

I believe, and I respectfully submit as I read your opinion, that you condemened that practice in that case, you said that it was hearsay, that it was prejudicial, and the words that you need --

THE COURT: Where's your letter of what you said you submitted to us?

MR. HOWARD: Yes, sir, I have your opinion here. I have got the advance sheet opinion. If I may read your

opinion in that case. After reviewing all of these statements of Thomason and the practice of the United States Attorney in that case --

THE COURT: Where is that? Where does that come from?

MR. HOWARD: Out of Norfolk, sir. Judge Kellam.

THE COURT: Who wrote the opinion out of Norfolk?

MR. HOWARD: Judge Widener, I believe sir. Widener, Ervin & Boyd. This is --

THE COURT: What did Judge Widener say that is so important to your argument here?

MR. HOWARD: In that case, just as Judge Bryan said in this case, he said it was overkill.

THE COURT: All right. Did he reverse the case?

MR. HOWARD; Yes, sir.

THE COURT: All right, what did he say in reversing the case? Did he reverse it on that ground?

MR. HOWARD: Yes, sir. he did.

THE COURT: Then, what's this?

MR. HOWARD: Indeed, the relation by Thomason, that's the agent, that what -- that based on what he told him, that Norris had told them, was double hearsay. Even more objectionable, of course, more unreliable than hearsay only once removed. The strategy of overkill, precisely the words Judge Bryan used, it's right in the transcript, the strategy of overkill pursued by the government with little regard to the countervailing concerns of undue prejudice has resulted in a trial which we think was essentially unfair -- was not essentially fair -- pardon.

At the bottom of the opinion, we are of the opinion that the limiting instructions of the trial court was insuf-

ficient to dispell the resulting prejudice from the introduction of legaless hearsay evidence on four separate occasions.

THE COURT; How about just tracking, we can look at it later, tell me how that relates in terms of people and who said what to whom in that case and this case.

MR. HOWARD: They put in a statement.

THE COURT: Who?

MR. HOWARD: The -- the Scotland Yard people took a statement from Martindale. During the course of that statement, they confronted Martindale with specific quotes from this witness, they confronted Martindale with specific quotes from this witness Phuc, this japanese gentlemen, which were taken from an interpreter, and those quotes of Phuc purportedly contained admissions, confessions -- well, not confessions, but statements, prejudicial statements that martindale made about Kidnap, about assassination, about weapons, guns, getting a gang of Cubans, all of this was why. And again, sir --

THE COURT: All right. They may put that in evidence.

MR. HOWARD: Yes, sir. Yes, sir.

THE COURT: And then they put in the original Martindale statement --

MR. HOWARD: They put all those statements in, but then they had the very witnesses, Drain, Burke, Fields, the three -- Scotland Yard -- they come over here and testify, essentially --

THE COURSE: Ostensibly, to --

MR. HOWARD: -- to the same or similar statements that Martindale had made to them which were contained in the written statement. They had it all.

THE COURT: Now, how does parallel -- what happened in Brown?

MR. HOWARD: In Brown, they put Thomason on the stand to testify that all of these statements made by various other people which were hearsay. Clearly, the statements --

THE COURT: They weren't trying to prove those statements that way. That was the whole record. They asked him his questions --

MR. HOWARD: Yes, sir.

THE COURT: -- in exactly the way we ordinarily state a question, and he answered it, and he denied it in every instance, didn't he?

MR. HOWARD: Yes, sir.

THE COURT: And he had all that in the record.

MR. HOWARD: Well, he acknowledged that he did certain things, but he said that he didn't have the criminal intent. The point is that the United States Attorney in Brown, as in this case in his argument at the bench and in his argument in his brief, Mr. Williams says, where's the harm? There was a cautionary instruction given by the trial court that was not offered for the truth, it was only to put everything in context, background. That was essentially what the U. S. Attorney did, the strategy of the U. S. Attorney in Brown. There is no difference. And the cautionary instruction you gentlemen said was not sufficient to dispel prejudicial nature of the hearsay.

THE COURT: (Inaudible)

MR. HOWARD: Yes, sir. Forgive me. Forgive me. If I may turn, sir, just --

THE COURT: (Inaudible)

MR. HOWARD: Two other points. When he got to customs, that was Agent Fanning. Now, I think all of this has to do with context. We realize he spent thirty days in Great Britain, he's had fifteen hours of interrogation,

one was (inaudible) but he comes to the United States, he gets to customs, the customs official Fanning admitted, admitted in pretrial motions that, number 1, he knew about the gun charge over in England, he knew he had been in trouble with the firearm rule, and he said, I went to the airport precisely to address that question and get a statement from him regarding the gun incident in England. That's all in the record. When he gets there, he --

THE COURT: You mean to say that if the government had some information the person was bringing narcotics into the United States, he can't stop that person when he comes into customs and interrogate him?

MR. HOWARD: Not at all, sir.

THE COURT: I hear your man has been transporting (inaudible) by his own admission, arms, and when he came back, they couldn't ask him about this at all?

MR. HOWARD: Excuse me. If I may, let me give all the facts. All the facts are that when he went through customs, he was given the normal search, and U. S. versus (inaudible) and all these, said you can do that. There's no right to privacy when you are coming through customs. We don't say there is. But they didn't stop there. They took him out of the line. They took him to a private room. They shut door. They emptied his pockets. They went through his wallet. They went through -- they did everything but strip search him. In their words, it was a hundred percent search. In their words, it was not the normal search.

THE COURT: Your objection isn't to that anyway. Your objection is to the subsequent conversation relating --

MR. HOWARD: Absolutely, sir.

THE COURT: The customs problems (inaudible) to his behavior in England before he got to the United States.

MR. HOWARD: Yes, sir, but I respectfully say and I believe -- and this goes back, if I may, to the Elstad case --

THE COURT: I think you are reacting, as people so often do, as though I am opposing you. I am rather inclined to listen to you on this point, because it does seem to me rather accepted, that not only have you given me some rigorous search, which the customs law allows, in order to have the customs law enforced, if you go ahead and start asking questions about a matter which involves possible criminal culpability, you have, possibly the investigators, did they not, had a copy of the subpeona for this man to appear before a grand jury, he never told the man about that, he extracts all the statements from him and the question is whether or not some sort of Miranda warning (inaudible) even the English Miranda warning he might have done nothing (inaudible) most this stuff might be used against him.

MR. HOWARD: Yes, sir, but putting in context what the Court said in Elstad, the recent Supreme Court, United States, decision which said that any statement taken after a person essentially is in custody, even if there is any constitutional violations where miranda has not been going into play, where he has not been involved, there is a presumption of compulsion, a presumption of compulsion. If I may --

THE COURT: What is the prejudice?

MR. HOWARD: Sir, well, the prejudice obviously was that they took a full statement, I believe they were in there 45 minutes, according to Fanning --

THE COURT: What in there incriminated him in the statement?

MR. HOWARD: They used that statement, sir, and they compared that statement to the statements he had made in England and they went down -- the guy, Coleman said

this is where he told us a different story at customs than what he had said when he was over in England, so they used it essentially to impeach him, so that's where the prejudice --

THE COURT: But there's only incriminating statements in it.

MR. HOWARD: It's a matter of interpretation. He admitted he was there, he admitted --

THE COURT: (Inaudible) they were false exculpatory statements, that they incriminated him?

MR. HOWARD: Yes, sir. I would like to say it was the next interview with Pedersen, after fanning, Pedersen was the ATF agent working in conjunction with the U. S. Attorney, King, with a subpeona in his pocket. He admitted, incidentally, that all subpeonas out of the District of Columbia always come attached with rights forms. He admitted that he worked with the U. S. Attorney on this, and, of course, as I cited in my brief, the manual, the U. S. Attorney's manual and the Department of Justice manual tells you that as matter of policy that you should advise people you are serving subpoenas on as to their rights. This was never done. When you look at the entire Odyssey chapter from the inseption over in Great Britain, the interrogation in Great Britain, the hundred percent search, the stopping at customs, and then the man coming with this bomb subpeona, to me, it really is startling and unbelievable that during the entire odyssey he was not told once that he had the right to consult with an attorney. Not one time.

Gentlemen, again I wasn't sure -- let me just—one final thing real quickly, if I may, and that's with respect to the posing as an agent. The bottom line on that is, when he went through customs, they brought a fellow named Jeff over here, Jeff said that all he could do is look at the passport and said there are two stamps; one said it was

his, and one (inaudible) an agent and that's all I know. He came through in October, he came through in July, and that was it. He was never -- it was never suggested to this jury that when he went through immigration in England that he represented himself to be an officer, but that he represented himself to be on a visit --

THE COURT: Did he use a diplomatic passport?

MR. HOWARD: Yes, sir, he did.

THE COURT: (Inaudible) that a representation?

MR. HOWARD: We take the position that the mere representation that he was an employee of the Government is not sufficient under the statute.

THE COURT: Well, (inaudible) just as an employee of the government, he had a diplomatic passport, which enabled him to take that gun in.

MR. HOWARD: Yes, sir, and I cite your case with the little girl, went to buy the dress, and she represented herself as being an FBI, employed with the FBI, they sold her the dress based on that representation and the form she filled out, correct, and they proceeded to sell the dress, and the bottom line on that opinion was she never represented she was buying that dress for the United States Government.

THE COURT: (Inaudible) Mr. Howard, your wasting your time with me.

MR. HOWARD: Yes, sir.

THE COURT: (Inaudible) with respect to the customs investigation is a serious one, but that argument is so lacking in merit that if you make it you detract from the importance of that other argument.

MR. HOWARD: Your Honor, I only bring that, because it was included in my brief, sir.

THE COURT: All right.

MR. HOWARD: Thank you so much for your time.

THE COURT: Mr. Williams, I hope you confine your argument to the discussion of the matter, the conference during the customs investigation.

MR. WILLIAMS: Certainly, Your Honor, I will.

THE COURT: Tell me, before you get into that, right quickly, why it was thought necessary to go through all that rigamarole in the trial. I know you don't want to leave any stone unturned, and you have tried to get a conviction and do your duty, but when in the world was the purpose of going through all of that rigamarole with the statements in England and then doubling back and putting in the whole statements again?

MR. WILLIAMS: Well, let me begin, there were variations in the statements including the statements made to the two key Scotland Yard investigators, Burke, first, and then Inspector Field on the next day. There were different admissions made. They conversed, although there was some overlap, they covered some different areas. Now, at the same time, there were some admissions made to Customs Inspector Fanning that were not in either of the statements made from Inspector Burke, or the statement to ATF Special Agent Pedersen. Let me give you --

THE COURT: Mr. Howard quoted from the record. There was some statements which were introduced which (inaudible) the Scotland Yard people carried, kidnapped, or seized, or caught whatever word you want to use, seized the witness (inaudible) and all the answer was was, no. Now, could you have put that witness on the stand and said, we told you you did this, and we told you you did that, and we told you you did the other thing. He couldn't have done that. You certainly couldn't have done it by hearsay. And he said, no. It seems to me it is questionable to the extreme to introduce those. Now, if the had gone

ahead and said, well, yes, I did try, he might have had a different question, because it is a little different from an exculpatory statement, but when he says a simple no, he's gotten into evidence the fact that ne respected law enforcement agency thought they had the goods on him. And I don't know why in the world you wanted to put that in.

MR. WILLIAMS: The reason --

THE COURT: (Inaudible) that wasn't really what you charged him with anyway. You had all the evidence that is just absolute that he had acquired this illegal firearm, and you had dead wood on him, he carried it with him over to England. You have every article evidence you needed.

MR. WILLIAMS: Well, let me -- there were really actually several -- several pile ups. First of all, about why the statements. First of all, there were only approximately two places, and I think counsel pointed them out, and you, Judge Murnaghan, mentioned them, where -- by Inspector Fields, and this is the second interrogation, where he made an accusation, and this accusation was denied, but in all the remaining places in both Inspector Fields' interrogation, when he said to him, did you say such and such a thing to Phuc, Martindale, in those instances, said this is what I said, I didn't say exactly that. Now, let me—

THE COURT: But what does that have to do with the firearm violation?

MR. WILLIAMS: Because what Martindale's story was, was that he didn't normally bring that firearm into --

(Tape malfunction.)